



**MEMO ENDORSED** - *py*

March 10, 2011

**VIA FACSIMILE**

Hon. Andrew J. Peck  
United States Magistrate Judge  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl St., Courtroom: 20D  
New York, NY 10007-1312  
Fax: 212-805-7933

USDC SDNY  
DOCUMENT  
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DATE FILED: 3/10/11

Re: *Wi-LAN Inc. v. LG Electronics, Inc. and LG Electronics U.S.A., Inc.*  
Civil Action No. 10 Civ. 432 (LAK) (AJP)

Dear Magistrate Judge Peck:

Defendants write in response to Plaintiff's letter of earlier today, and to request clarification of certain of your rulings during the February 10, 2011 status hearing concerning Defendants' reliance upon advice of counsel as a defense to willful infringement (the "Opinion Defense"). (Relevant excerpts of the transcript of that hearing are attached hereto as Exhibit A.) Since that hearing, Defendants have been working in good faith with Plaintiff to obtain formal deposition notices and to address availability for depositions of both the relevant LG and McKenna Long & Aldridge ("MLA") witnesses. However, it has become apparent during this process that the parties' respective understanding of the Court's rulings differ. As such, Defendants respectfully request clarification on the following issues.

**Production of Translations**

During the February 10, 2011 hearing, Your Honor ordered the parties to split the cost of translation of all Korean language documents produced by Defendants in connection with their assertion of the Opinion Defense. (Ex. A at 26:5-6.) On February 17, 2011, Plaintiff sent Defendants a translation proposal identifying the translation vendor and the parties' respective shares in the cost. (See Exhibit B.) Defendants agreed to that proposal, and it was Defendants' reasonable understanding that, given the parties were sharing in the costs of the translations, the parties would both receive copies of the certified translations. However, when Defendants requested copies of those translations, Plaintiff refused to produce them. (See Exhibit C.) The Court has already ruled that translations are not work product—regardless of who pays for them. (See Ex. A at 25:11.) Accordingly, Plaintiff simply has no basis on which to refuse their

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\*OPERATES AS GREENBERG  
TRAURIG MANIER LLP  
--STRATEGIC ALLIANCE

Hon. Andrew J. Peck  
March 10, 2011  
Page 2

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production. Defendants respectfully request that the Court order Plaintiff to immediately produce the translations.

**Plaintiff's Demands for a 30(b)(6) Witness from LG**

Since the February 10, 2011 hearing, Defendants have continually sought confirmation from Plaintiff of its intention to depose the authors and recipients of the opinion letters, as well as sought corresponding notices of depositions. However, it was not until March 4, 2011 that Plaintiff served notices of depositions—after Defendants indicated to Plaintiff that they would assume that Plaintiff did not intend to proceed with the depositions of the LG and MLA witnesses if Defendants did not receive respective notices by that date.

Defendants have already arranged for the two pertinent LG witnesses to travel from Korea to provide individual deposition testimony relevant to the Opinion Defense and have confirmed those March 16 and 17, 2011 deposition dates with Plaintiff. However, it is Defendants' understanding that they are not required to produce a 30(b)(6) witness from LG, in addition to the two recipients of the opinion letters, except in the limited situation where Defendants may elect to present a different 30(b)(6) witness at trial on this issue. Indeed, Your Honor stated:

"The recipients, whether that is one person or two, are not going to testify at trial but nevertheless they are the recipients, if Mr. Sipiora still wants them he gets them. **If there is somebody else you are going to bring as a 30(b)(6) witness at trial on this subject**, you will bring that person as well..." (emphasis added). (See Ex. A at 24:7-21.)

In accordance with the Court's instructions above, Defendants represent that they do not intend to call a different, 30(b)(6) witness on this issue at trial, and therefore it is Defendants' understanding that they are not required to produce a 30(b)(6) witness at all. However, should the Court order Defendants to produce a 30(b)(6) witness for a third day of testimony, Defendants can make Mr. Jeffrey Cho available on March 16 and 17.<sup>1</sup>

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<sup>1</sup> Previously Defendants incorrectly indicated that Mr. Jeffrey Cho may be available on March 18, 2011. He is not available on March 18, 2011, because he must return to Korea by March 19, 2011.

Hon. Andrew J. Peck  
March 10, 2011  
Page 3

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**Plaintiff's Demands for a 30(b)(6) Witness from MLA and Dates of Deposition**

Plaintiff simply has no basis on which to demand 30(b)(6) witnesses from MLA. Your Honor made it clear—in the very paragraph that Plaintiff cites from the February 10, 2011 hearing—that Defendants "will bring ... the two McKenna Long lawyers who wrote the letter" to New York for a deposition. (Ex. A at 24:17-21.) Indeed, Plaintiff previously admitted that it only gets to depose the attorneys who signed the opinions. (Exhibit D, March 1, 2011 Email from M. Holohan to E. Maiers ("The Court made it clear that Plaintiff is entitled to depose the individual signatories")) (emphasis added). At no point did the Court ever order Defendants to produce a third, 30(b)(6) witness from MLA. Accordingly, Plaintiff's request for a 30(b)(6) witness from MLA should be denied.

In the interest of limiting the burden on the parties and reducing the cost to the parties, Defendants made a good faith proposal to Plaintiff that they would produce a single 30(b)(6) witness from MLA instead of the two individual attorneys and would stipulate that this would be the only MLA witness offered at trial. Plaintiff has since rejected that proposal.

Defendants have now learned that Mr. Kresloff and Mr. Choi, the attorneys who signed the opinions, are traveling extensively, both domestically and internationally, through the end of the month, and therefore will not be available for depositions until April 12, 2011.<sup>2</sup> While Defendants do not believe the issue of reliance upon opinion of counsel has any relevance to any possible dispositive motion<sup>3</sup>, Defendants nevertheless are willing—with the Court's approval—to permit Plaintiff a reasonable amount of time after deposing the MLA attorneys to supplement any relevant summary judgment filings they may have. Defendants accordingly respectfully request that the Court approve Defendants' offer to permit Plaintiff to supplement its summary judgment filings.

**Conclusion**

Defendants respectfully request the Court's earliest consideration and guidance on the above-referenced issues and order the following:

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<sup>2</sup> Should the Court require, LG can obtain a signed declaration from MLA regarding Msrs. Kresloff's and Choi's unavailability due to travel.

<sup>3</sup> Unlike certain liability issues, such as patent infringement and invalidity, willfulness is a damages issue, and the issue of the awarding of treble damages is usually reserved for the Court, as opposed to the jury. See *Slater Electric, Inc. v. Indian Head, Inc.* 223 U.S.P.Q. 729, 730 (S.D.N.Y. 1983).

Hon. Andrew J. Peck  
March 10, 2011  
Page 4

1. Order that Plaintiff must produce all translations to Defendants by close of business on Friday, March 11, 2011;
2. Confirm its Order that Plaintiff is only entitled to depose, for one day each, the two LG employees who received the opinions, based on LG's representation that no other LG witness will be offered at trial on the Opinion Defense;
3. Confirm its Order that Plaintiff is only entitled to depose, for one day each, the two MLA attorneys who signed the opinions, and that it is not entitled to a separate 30(b)(6) deposition; and
4. Order that Plaintiff is entitled to supplement its briefing on the issue of willfulness within two weeks of the depositions of the MLA attorneys.

Respectfully submitted,

  
James J. Lukas, Jr.

cc: Counsel of record (via e-mail)  
NY 241,017,319v1

**MEMO ENDORSED**

- 3/10/11
1. If As pay 100% of its translation cost it can be  
this, please of 50% if not not provide copy to As.
  2. Only the 2 LG witnesses, not another 30(b)(6) witness  
(from para 2 of 30(b)(6) witness)
  3. 20 2 MLA attorneys, provided that As  
signatures it will not call any other MLA  
witness on its order of default case.
  4. MLA attorneys to occur on between 4/12 and 4/17 on  
mutually agreeable date and it can supply its numerous  
notar pages re those depositions of moving.

**BY ECF**  
GREENBERG TRAUTG LLP

SO ORDERED:

  
Hon. Andrew Jay Peck  
United States Magistrate Judge

CM ECF, All Good  
Judge Hark

# ECF TRANSCRIPTION SHEET



**ANDREW J. PECK**  
**UNITED STATES MAGISTRATE JUDGE**  
**UNITED STATES DISTRICT COURT**  
Southern District of New York  
United States Courthouse  
500 Pearl Street, Room 1370  
New York, N.Y. 10007-1312

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**Dated: March 10, 2011**

**Total Number of Pages: 5**

## **TRANSCRIPTION OF MEMO ENDORSED ORDER**

1. If defendants pay 100% of the translation costs it can have copies, otherwise at 50% plaintiff need not provide copies to defendants.
2. Only the 2 LG witnesses, not another 30b6 witness (nor those 2 as 30b6 witnesses).
3. The 2 MLA attorneys only, provided that defendants stipulate it will not call any other MLA witness on the advice of counsel issue.
4. MLA depositions to occur on between 4/12 and 4/17 on mutually acceptable dates and plaintiff can supp its omnibus motion papers re those depositions if necessary.

Copies by ECF to: All Counsel  
Judge Lewis A. Kaplan